

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 9, 2007 Session

MARY MARGARET WESTER v. RONALD ALLAN MCDOW

Appeal from the Circuit Court for Davidson County
No. 05D 3722 Muriel Robinson, Judge

No. M2006-02457-COA-R3-CV - Filed April 16, 2009

In this highly contentious divorce case, the trial court found both parties in contempt of its orders and ordered them each to serve ten days in jail, starting immediately. The parties were released after 12 hours, and the remainder of their sentences were stayed for six months to be vacated upon future compliance with court orders. The wife argues on appeal that her sentence should have been suspended or vacated rather than stayed, and that the trial court erred by sentencing her without taking the principles of Tenn. Code Ann. § 40-35-103 into account. Because this court cannot provide any real or practical relief, we decline to address the issues raised by the wife and dismiss the appeal as moot.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed and Remanded

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which ANDY D. BENNETT, J., and DON R. ASH, SP. J., joined.

Russ Heldman, John J. Hollins, Sr., Mary Frances Lyle, Nashville, Tennessee, for the appellant, Mary Margaret Wester.

Helen Sfikas Rogers, Siew-Ling Shea, for the appellee, Ronald Allan McDow.

OPINION

I. A CONTENTIOUS DIVORCE

Dr. Ronald Allan McDow (“Husband”) and Ms. Mary Margaret Wester (“Wife”) were married in 1989. Their marriage produced one child, a daughter who was born in 1995. Dr. McDow patented a product which formed the basis of a successful business called CryoSurgery, Inc. The parties operated the business from their home in Nashville, and the company also maintained an office on Old Harding Pike in Nashville.

On October 11, 2005, Ms. Wester filed a complaint for absolute divorce against Dr. McDow on the grounds of irreconcilable differences and inappropriate conduct. The complaint alleged that Husband and Wife were equal owners of CryoSurgery, Inc. and that Wife had been primarily responsible for running the company since 1999. She further alleged that now that she was seeking divorce, Husband has claimed that the company was his alone and that she had no right to write checks on the company accounts. Wife asked the court for equitable division of the marital property and to enjoin both parties from making changes in CryoSurgery's banking arrangements and signatory rights.

The court entered a restraining order in accordance with Wife's request. It also entered a statutory restraining order against both parties, pursuant to Tenn. Code Ann. § 36-4-106(d). Among other things, the order enjoined them from "transferring, assigning, borrowing against, concealing, or in any way dissipating or disposing of any marital property without permission of the Court or by consent order." The order also enjoined them from "harassing, threatening, assaulting or abusing the other party and from making disparaging remarks about the other party to or in the presence of any children of the parties or to an employer of a party."

Despite the restraining orders, the parties engaged in frequent intense arguments with each other, often in the presence of their child. Many of their arguments involved the operation of the business and the use of their respective home offices and other parts of the marital home. In response to various motions, the court issued additional orders to clarify the business relationship of the parties during the pendency of the divorce. In one order, the court ordered Wife to return to Husband's home office all the corporate books and proprietary files of CryoSurgery, Inc. that she had removed. In another order, the court directed Husband to continue as President and Chief Executive Officer of the company, Wife to continue as Secretary/Treasurer, and both parties to work together for the good of the corporation.

The court also set out some ground rules, including a requirement that both parties sign any checks drawn on the corporation, that they agree on an appraiser to place a value on the company and on Husband's patents, and that they file monthly reports to the court containing a description of the duties performed by each on behalf of the corporation. The present appeal arose from violations of an order entered by the trial court on February 8, 2006. In that order, the trial court denied the wife's motion for exclusive possession of the marital residence, directed that Husband should not be excluded from the residence, and ordered instead that:

1. Each party is enjoined from coming within ten (10) feet of each other in the marital residence;
2. Neither party shall enter the office or bedroom of the other party;
3. Neither party shall shred, nor cause to be shredded, any documents not agreed upon as needing to be shredded in the ordinary course of business.

In a subsequent order, the court ordered the removal of the regulatory files of the business to the Old Harding Pike office, so both parties could have access to those files.

On August 18, 2006 Husband filed a petition for contempt. He alleged that Wife had violated the court's order by entering his locked office while he was out of town, that she had searched through his business and private records including his private communications with his attorneys, and that she removed numerous documents from the office. On September 14, 2006, Wife filed her own petition for contempt. Her petition included allegations that Husband had deposited company money in his personal account, installed illegal wiretaps on Wife's telephone, torn up company records and thrown them into the trash, verbally abused her in the presence of their daughter, and entered her home office on a frequent basis.

II. THE CONTEMPT HEARING

A full day of hearing on both motions for contempt was conducted on November 9, 2006. The proof showed that Husband had placed a dead-bolt lock on the door to his home office. Wife then hired a locksmith, who came to the house on August 10, 2006, a day that Husband was out of town. He used a lock pick to open Husband's office door and made a key for entry into the office, which he gave to Wife. The locksmith testified that Wife told him not to write up an invoice and that she paid him in cash to conceal her use of his services.

Unbeknownst to Wife, however, Husband had installed two matchbox-sized video cameras in his office and bedroom, which were connected to a digital video recording system. Husband had also hired a private investigator to monitor his wife's activities. The investigator observed the locksmith's van coming to the house and as well as a vehicle that proved to be owned by another private investigator. He contacted Husband and advised him to check the activity on the recording system.

The resulting video showed Wife entering Husband's office repeatedly, opening drawers, and going through his personal papers and effects, both on August 10 and on the following day. Wife wore thin plastic gloves while she went through Husband's things. The video also showed the investigator who had been hired by Wife to sweep the house for electronic bugs entering the Husband's office and bedroom. Other proof in the record included numerous audio recordings made by Wife of Husband yelling at her and arguing with her.

At the conclusion of proof, the trial court announced that it found both parties to be in willful criminal contempt of its orders. Husband's violations included throwing away personal financial records, writing a very large check in violation of the court order that required two signatures, and making disparaging remarks about Wife in the presence of the child.

The court also declared that the proof was overwhelming of Wife's violation of the court's order, characterizing her deliberate entry into Husband's home office as "the most egregious conduct against a court order that this court has seen in quite some time." The court further found that Wife deliberately created provocations in the presence of the child.

The court sentenced both parties to ten days in jail with service of both sentences to begin immediately. The court also told Wife that when she was released, she would be barred from the marital home and would have to move herself and her child to another house that the parties owned in Nashville. The attorneys for both parties immediately moved the court for a stay of its orders, which the court denied.

Wife's attorney then announced that he intended to file a Tenn. R. App. P. 9 application for interlocutory appeal of the court's order and that his client was entitled to have her sentence stayed under Tenn. R. Civ. P. 62.04 pending that appeal. The court responded that under the cited rule a bond had to be filed and approved by the court before a stay could be obtained. The Circuit Court Clerk's office was apparently closed by that time. After further discussion, the trial court agreed to order the Circuit Court Clerk to open the office the next morning so that the required bond could be filed.¹ Both parties accordingly spent the next twelve hours in the Metro Jail and were released after the appeals and bonds were filed and approved.

Wife subsequently filed a motion for reduction or suspension of her sentence. Her motion stated that she was an exemplary citizen who had never been charged with a crime and recited her numerous philanthropic good deeds in the community. On Friday, December 15, 2006, the court conducted a hearing on that motion and on three discovery motions filed by Wife. Prompted by leading questions from her attorney, Wife testified that she was remorseful about violating the court's order, that the twelve hours in jail got her attention, and she promised that she would never again be guilty of contempt of court. Nonetheless, the court denied her motion.

The short period of incarceration may have been the "wake-up call" needed to motivate the parties to work out some of their differences. They began mediation in late December and executed a marital dissolution agreement ("MDA") on January 8, 2007, dividing up a large quantity of marital property in a relatively short time. The MDA included a provision which read:

The Husband agrees to withdraw his pending contempt against the wife. **The parties shall mutually request the Court to suspend the ten (10) days sentence for contempt imposed on each party at the final hearing of this cause subject to the parties' future compliance with the Orders of the Court.** If such suspension is put in effect, then both parties shall suspend their current appeals of those orders of contempt. (emphasis added).

The court conducted a hearing on January 11, 2007, and approved the marital dissolution agreement, which was incorporated into the Final Decree of Divorce. In a separate order, the court stayed the remaining balance of both parties' sentences for contempt for a period of six months, pending "full and complete compliance with the terms of the Permanent Parenting Plan." The trial court further decreed that upon the expiration of the six month period, if there were no further

¹The following day was Friday and was apparently a holiday, so if the court had not agreed to have the clerk come in the morning, the parties would have had to wait until Monday morning before their sentences could be stayed.

findings of contempt, the remaining balances of the contempt sentences would be vacated.² Despite the flexibility shown by the court and the mutual promises in the MDA, Wife chose to proceed with her appeal to this court.³

III. THE SENTENCE FOR CONTEMPT

On appeal, Wife does not dispute the trial court's finding of contempt against her. Nor does she object to the court's imposition of a ten-day sentence for that contempt. Thus, Wife does not challenge her status as a contemnor, nor does she challenge the length of incarceration imposed.

Instead, her appeal is based solely on the question of whether the trial court should have suspended her sentence or vacated it after the hearing of January 11, 2007, rather than only staying it. Wife argues that her sentence for criminal contempt should have been imposed in accordance with Tennessee Code Annotated § 40-35-103, a provision of the Criminal Sentencing Reform Act of 1989 ("the Sentencing Act"), and that she was entitled to probation thereunder in light of her previously unblemished record and of her service to the community. The result, she argues, would have been suspension of the remainder of the incarceration sanction, rather than a stay.

Under the Sentencing Act, a suspended sentence and probation may be imposed for a period of time not to exceed "the statutory maximum time for the class of the conviction offense." Tenn. Code Ann. § 40-35-303(c)(1). In this case, the stay was imposed for 6 months. Were the trial court bound by the terms of subsection (c)(1), the probationary period could only be for ten days.

In essence, the situation is this. Wife willfully and blatantly violated orders of the court. She served twelve hours of a ten day sanction. The trial court then stayed the remainder of her incarceration for six months, conditioned upon her "full and complete compliance" with the parenting plan. We must point out that she was required to comply with further orders from the court without the conditions of the stay and that we do not view compliance with orders as a burdensome or unusual directive. The trial court clearly stated that if there were no further findings of contempt within that six months, the remainder of the contempt sanction would be vacated. In the MDA, Wife agreed to a suspension conditioned upon "future" compliance with court orders. Apparently, Wife intended to agree to only nine and one-half days of compliance because she now argues she should not have been subject to six months of compliance as a condition of avoiding the remainder of the contempt sanction.

²Husband's attorney submitted a proposed order, setting out the conditions described and reciting that the court would suspend the remaining balances of the sentence for both parties if those conditions were met. The court replaced the word "stay" everywhere it appeared in the proposed order with the word "suspend" and then signed the order.

³Although Wife's attorney initially intended to pursue Tenn. R. App. P. 9 interlocutory appeal, this appeal came to us via Tenn. R. Civ. P. 54.02, when the trial court declared its denial of Wife's motion to suspend her sentence a final order for purposes of appeal, "there being no just reason for delay."

Under the stay ordered by the court, Wife's remaining sentence was subject to being vacated on July 11, 2007. The record does not indicate any further finding of contempt. Neither, however, does it indicate any action by Wife to seek the remedy already offered by the trial court. In oral argument of this appeal, which occurred several months after the six month stay had expired, counsel represented to this court that no further contempt had occurred and no motion for contempt had been filed. However, Wife had not sought vacation of the remainder of the sentence from the trial court at the end of the six months.

By the time of oral argument, both the nine days of a suspended sentence, as Wife has argued applied, and the six months of the court-ordered stay had expired. Wife was no longer subject to incarceration for the remaining nine and one-half days, under either a suspended sentence or under the stay ordered by the court.

A case will be considered moot if it no longer serves as a means to provide some sort of relief to the party who may prevail. *McCanless v. Klein*, 182 Tenn. 631, 188 S.W.2d 745, 747 (1945). The concept and its application have been explained thusly:

The requirements for litigation to continue are essentially the same as the requirements for litigation to begin. *Charter Lakeside Behavioral Health Sys. v. Tennessee Health Facilities Comm'n*, No. M1998-00985-COA-R3-CV, 2001 WL 72342, at *5 (Tenn. Ct. App. Jan 30, 2001) (No Tenn. R. App. P. 11 application filed). A case must remain justiciable through the entire course of litigation, including any appeal. *State v. Ely*, 48 S.W.3d 710, 716 n. 3 (Tenn. 2001); *Cashion v. Robertson*, 955 S.W.2d 60, 62-63 (Tenn. Ct. App. 1997). A case is not justiciable if it does not involve a genuine, continuing controversy requiring the adjudication of presently existing rights. *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 193 (Tenn. 2000); *Ford Consumer Fin. Co. v. Clay*, 984 S.W.2d 615, 616 (Tenn. Ct. App. 1998).

A moot case is one that has lost its justiciability because it no longer involves a present, ongoing controversy. *McCanless v. Klein*, 182 Tenn. 631, 637, 188 S.W.2d 745, 747 (1945); *County of Shelby v. McWhorter*, 936 S.W.2d 923, 931 (Tenn. Ct. App. 1996). A case will be considered moot if it no longer serves as a means to provide some sort of judicial relief to the prevailing party. *Knott v. Stewart County*, 185 Tenn. 623, 626, 207 S.W.2d 337, 338-39 (1948); *Ford Consumer Fin. Co. v. Clay*, 984 S.W.2d at 616. Determining whether a case is moot is a question of law. *Charter Lakeside Behavioral Health Sys. v. Tennessee Health Facilities Comm'n*, 2001 WL 72342, at *5; *Orlando Residence, Ltd. v. Nashville Lodging Co.*, No. M1999-00943-COA-R3-CV, 1999 WL 1040544, at *3 (Tenn. Ct. App. Nov. 17, 1999) (No Tenn. R. App. P. 11 application filed). Where a case on appeal is determined to be moot and does not fit into one of the recognized exceptions to the mootness doctrine, the appellate court will ordinarily vacate the judgment below and remand the case to the trial court with directions that it be dismissed. *Ford Consumer Fin. Co. v. Clay*, 984 S.W.2d at 617; *McIntyre v. Traugher*, 884 S.W.2d

134, 138 (Tenn. Ct. App.1994).

Alliance for Native American Indian Rights in Tenn., Inc. v. Nicely, 182 S.W.3d 333, 338 (Tenn. Ct. App. 2005).

We conclude this case is moot. This court cannot grant Wife any real or practical relief. She no longer faces potential incarceration for the remaining nine and one-half days of the sanction for contempt. The six months of the court's stay has expired, and no further contempt petitions were filed. The nine days of any suspended sentence, under Wife's argument, also expired long ago. To the extent Wife feels burdened by the stay conditioned on her compliance with court orders, she is free to ask the trial court to enter an order vacating the remainder of the sanction in accordance with its prior order. She has the power to obtain relief in the trial court; she simply has chosen not to seek it. We decline to grant it in this court. *See* Tenn. R. App. P. 36.

IV. ATTORNEY FEES ON APPEAL

Husband has argued on appeal that the trial court did not err in declining to grant Wife a suspension of her sentence. He also raises one argument of his own: that since Wife failed to suspend her appeal in accordance with the parties' contractual agreement, he is entitled to attorney fees and costs "for having to file a response to a frivolous appeal."⁴

Tennessee Code Annotated § 27-1-122 authorizes a reviewing court to award "just damages," including expenses and attorney fees incurred by the appellee, against an appellant who brings a frivolous appeal. "A frivolous appeal is one that is 'devoid of merit,' or one in which there is little prospect that it can ever succeed." *Indus. Dev. Bd. of City of Tullahoma v. Hancock*, 901 S.W.2d 382,385 (Tenn. Ct. App. 1995).

The reason for assessing costs for frivolous appeals is that "[s]uccessful litigants should not have to bear the expense and vexation of groundless appeals." *Davis v. Gulf Ins. Group*, 546 S.W.2d 538, 586 (Tenn. 1997). However, the authority to assess damages for a frivolous appeal must be "applied strictly so as not to discourage legitimate appeals." *Id.*

While we have determined that Wife's appeal is moot since we can provide her no practical relief, we cannot conclude that her appeal was unwarranted at the time it was filed. At that time, the six months of the court ordered stay had not expired and Wife faced the possibility of imposition of the remainder of the contempt sanction. Additionally, in the particular circumstances of this case, Husband's interests were not at risk or likely to be affected in any way by this court's ruling on the question of whether or not Wife was entitled to have her sentence suspended. Consequently, we decline to award Husband his attorney fees incurred in this appeal.

⁴He also bases his argument on a provision of the parties' MDA, which reads, "[i]n the event that it becomes necessary for either party to institute legal proceedings to procure the enforcement of any provision of this agreement, he or she shall be entitled to a judgment for reasonable expenses, including attorney fees, incurred in prosecuting the action." With regard to the contractual argument, we are not convinced that the specific wording of the provision on fees and the provision on suspension of sentence, taken together, apply to the circumstances of this case.

V.

We find this appeal is moot and dismiss it. The case is remanded to the Circuit Court of Davidson County for any future proceedings necessary, including proceedings on vacating the remainder of the contempt sanction if requested by either party. Tax the costs on appeal to the appellant, Mary Margaret Wester.

PATRICIA J. COTTRELL, P.J., M.S.